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Justice Policy
NSW Department of Justice
GPO Box 6, SYDNEY, NSW 2001

9 March 2015

Dear Attorney-General, and Justice Policy Division

Re: Discussion Paper - Amendment of Limitation of Actions Act 1969 for civil claims for child abuse – submission by Associate Professor Ben Mathews endorsing amendment (Option A)

I am writing to support reform of the ***Limitation of Actions Act 1969*** for civil claims for child abuse, including for child sexual abuse. I am an Associate Professor and Senior Research Fellow in the Faculty of Law at Queensland University of Technology, and a Professorial Fellow at the Australian Royal Commission into Institutional Responses to Child Sexual Abuse.

I have extensive research experience and a national reputation in this field, and I was personally invited by the Secretary to comment on the Discussion Paper. I am pleased that some of my research informed and was cited in the Discussion Paper, especially my two foundational research articles in the *Torts Law Journal*, and two related articles:

1. B Mathews, 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2003) *11*(3) *Torts Law Journal* 218-243.
2. B Mathews, 'Post-Ipp special limitation periods for cases of injury to a child by a parent or close associate: new jurisdictional gulfs' (2004) *12*(3) *Torts Law Journal* 239-258.
3. B Mathews, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' (2004) *27*(3) *University of New South Wales Law Journal* 631-666.
4. B Mathews, 'Assessing the Scope of the Post-Ipp "Close Associate" Special Limitation Period for Child Abuse Cases' (2004) *11 James Cook University Law Review* 63-83.

The options canvassed in the **New South Wales Discussion Paper**, and particularly in **Option A**, suggest there is substantial support for the legislative abolition of the time limit for civil claims for injuries in criminal child abuse cases, and for this to be made retrospective. Based on my multidisciplinary and multi-jurisdictional research findings, I support this reform. This would set a new landmark in optimal legislative frameworks to deal with child sexual abuse cases (and similar criminal child abuse cases). This reform would be of national and international significance, especially since it would be made by the jurisdiction which is Australia's most populous, and which possesses the most widespread international reputation. This is a genuinely groundbreaking moment for legal and social reform in Australia. It would serve as a model for how a mature liberal democracy develops law about access to justice in this context, properly informed by science, ethics and the rule of law. It would set an example for jurisdictions elsewhere in Australia and overseas.

In sum, I endorse in the strongest possible terms reform through Option A. I congratulate the Attorney-General and Department of Justice for thoroughly exploring reform options. The extensive research in my articles above provides detailed analysis and reasons supporting Option A, but I have also provided summary responses to each Discussion Question in the **Appendix** to this letter.

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Finally, the Discussion Paper and my comments in response to it should be placed in the context of **recent developments in Victoria**. My research was cited to underpin Victoria's *Betrayal of Trust Inquiry* findings and recommendations to reform its ***Limitation of Actions Act 1958*** to abolish the time limit for civil claims for injuries in criminal child abuse cases (2013, Vol 2, p 542-3). On 28 October 2014, the Victorian Attorney-General at the time (Robert Clark, Liberal Party) sought my advice on the nature of the optimal reforms, which I provided. On **23 February 2015**, the *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2015* (Vic) was introduced by Victoria's new Labor Government (by Attorney-General Martin Pakula). The Bill removes the time limit within which a plaintiff can bring a civil claim for injuries caused through physical abuse or sexual abuse in childhood, and psychological abuse arising from those acts (s 1; s 4, inserting new s 27O). This abolition of the time limit was also made retrospective (s 4, inserting new s 27P).

Victoria's bill is likely to be passed, given the Labor majority in the Lower House, the composition of the Upper House, and bipartisan support for this bill (being drafted in 2014 by Victoria's then Liberal Government, and subsequently introduced in 2015 by the new Labor Government). It has a potential commencement date of 1 September 2015 (s 2). The apparently imminent passage of Victoria's bill provides further impetus for similar reform in New South Wales.

I hope you find the information in this submission useful. Please feel free to contact me if I can be of further assistance.

Yours sincerely

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Appendix: Responses to Discussion Questions – Associate Professor Ben Mathews, supporting Option A

Discussion Question	Response
1. Do the existing statutory exceptions to limitation periods provide sufficient access to justice for victims of child sexual abuse?	No. The existing exceptions are insufficient to provide access to justice. This has been extensively analysed from multiple perspectives (theoretical, legal and practical), and the conclusion is inescapable.
2. Do the advantages of Option A outweigh any disadvantages?	Yes. Option A has four strong advantages as set out at p 10-11, which make it the clearly superior option. In addition, it should be noted that: 1) Option A would also increase the likelihood of claims being settled at an early stage, further reducing trauma for victims, reducing cost and time, and reducing the burden on court systems; 2) Option A would secure parity with the pending Victorian legislation (it is highly desirable for the new legislative context to be as harmonious as possible across jurisdictions) 3) Courts are not only able, but expert in, weighing evidence in claims that come before them, including difficult claims; it is a court's reason for existing. The point is that even in the situation of old claims being ventilated, courts will be able to weigh the evidence and determine whether there is sufficient evidence to ground a claim without causing undue prejudice to the defendant (and there is a sufficient residual control on such claims: addressed in Discussion Question 3) 4) Even with Option A, which is the broadest reform method, substantial proportions of survivors of historical abuse (and of abuse in future) may not seek redress through the courts. This is because, even with the most justifiable LAA model, many survivors will feel unable to pursue a claim (either due to existing trauma, fear of re-traumatisation, distrust of the system, lack of ability to fund a claim, an impecunious defendant, inability to navigate the legal system, lack of agency, intellectual or other impairment, etc). In addition, the experience of jurisdictions overseas (especially from Canada) indicates that these reforms are manageable by courts and civil systems generally. So, the best evidence indicates that Option A reform is sustainable from the perspective of courts' and systems' efficiency and economics.
3. If Option A were adopted, would it be sufficient to rely on existing civil procedures (such as applications to strike out, dismiss or stay proceedings) to protect the proper administration of justice, including in cases where a fair hearing of a matter may not be possible?	Yes. Courts have the sufficient experience and expertise to implement these natural controls on litigation of unfair claims, as embodied in the common law (Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, 551). In addition, a legislative provision could explicitly embody this (see the Victorian Bill, s 4 inserting s 27R).
4. Do the advantages of Option B outweigh any disadvantages?	No. Option B (the Ontario model) merely reverses the presumption. It would still allow a defendant to contest the central issue of the expiry of time barring a plaintiff who was allegedly able to commence proceedings previously, with all the disadvantages that flow from this (including trauma, inequity, indeterminacy and uncertainty, cost). In addition, it differs from the proposed Victorian model.
5. Are there other advantages or disadvantages of Option B?	No. Option B is inferior to Option A in multiple respects.

6. Do the advantages of Option C outweigh any disadvantages?	No. Option C is inferior to Option A in multiple respects. It still requires a plaintiff to prove disability, with all the trauma, cost and uncertainty involved in that process. The burden, trauma, cost and risk of having to prove disability would likely deter many survivors from even attempting to do so. A powerful or intransigent defendant is still able to rely unfairly on the time limit.
7. Is there any appropriate way to amend the latent injury exception to better accommodate child sexual abuse claims?	No. My considered view, after extensive and careful analysis, is that there is not a practicable or justifiable way to do this.
8. Is there value in adopting Option D, either alone, or in combination with any of the other options?	No. Option D is out of the question. Very few criminal convictions occur in this context. This would make the situation even more unjust than it is currently.
9. If Option D were adopted, should it apply only to civil claims against the direct perpetrator of the sexual abuse, or is there scope for it to also apply to claims against third party institutions responsible for allowing the abuse to occur?	Not applicable in light of the response to Question 8 - no need to discuss.
10. Should the 2002 amendments relating to minors be retained as is or amended in light of the issues raised above?	Option A should be adopted and this will demand the removal of the 2002 amendments as matter of legal principle. This is a straightforward and necessary reform. The 2002 amendments had the technical effect of providing a more justifiable limitation period in a small category of cases. However, these amendments were still not sufficient even for this category of cases, and the Act left other classes of case in arguably an even worse position.
11. How should the type(s) of actions to which any amendments apply be defined?	My considered view, after extensive and careful analysis, is that the type of actions should encompass those arising from 'child sexual abuse, [criminal] child physical abuse, and the injuries thereby caused (whether physical, psychological, or both).' This is based on the scientific evidence from the child maltreatment field, and has the further advantage of parity with Victoria. Note 1: This would exclude from the scope of the permitted actions any claim based **only** on emotional or psychological abuse, or emotional neglect (by parents or caregivers). There is an argument that such childhood experiences, where they are of a severe nature, can be just as harmful for a child as physical and sexual abuse, and therefore should also be permitted. However, this is a difficult issue and it may be premature and unworkable for the reform model to extend that far. However, my proposal would mirror the approach adopted by Victoria, which includes '*psychological abuse...that arises out of that* [physical abuse or sexual abuse]'. This includes an action involving psychological abuse which accompanied the physical or sexual abuse. I would recommend that NSW follows suit in including these cases. Note 2: There are questions in the literature about the appropriate definition of the term 'sexual abuse', and in fact I am currently writing an article about this topic with an international expert. Similar questions may be raised about the term 'physical abuse'. However, my view is that for the purpose of reform of the LAA, the term 'sexual abuse' should include any sexual assault, sexual misconduct, and sexual abuse.

12. Should any legislative amendments be retrospective?	Yes. Option A should be applied retrospectively, for the strong policy reasons outlined above, and to achieve parity with Victoria.
13. If they are to be retrospective, what transitional provisions may be required?	Claims on foot should be deemed to fall within the new model. Claims previously determined to be prima facie out of time and denied a grant of an extension of time for reasons ***only*** of prejudice to the defendant may need to be excluded from the new model, although this should be considered carefully. Claims previously determined (whether in or out of court) in favour of the defendant based only on the expiry of time, and ***not*** on either the substantive merits of the case, or on grounds of prejudice to the defendant, should be eligible for re-litigation under the new model, although this should be considered carefully. This is for reasons of equity, and because – since the case has not been determined finally on the substantive merits - there are no countervailing arguments involving the doctrines of res judicata or collateral estoppel.
14. Is it likely that changes to the application of limitation periods to child sexual abuse cases would lead to a significant increase in the number of cases commenced?	There is likely to be an increase in the number of claims, which is to be expected, as this is the intention of the reform. However, for the reasons provided previously (see **Discussion Question 2, response point 4**), many survivors will choose not to bring a claim even after the reform. In addition, some legal obstacles remain where the defendant is a particular kind of organisation with a particular kind of litigation strategy (such as the Pell defence). The available evidence indicates that overseas jurisdictions which have made similar reforms have found any increase in claims to be economically and practicably manageable. Furthermore, these jurisdictions' reforms have been continued after many years of operation, indicating that the management of any increase is sustainable in the longer term. In addition, it may be expected that if any kind of redress scheme is implemented after the Royal Commission for situations of institutional sexual abuse, this would further sequester a subset of eligible cases and dilute some of the demand for uptake of the new capacity to bring a civil claim. This is especially so since seeking redress under a non-adversarial scheme will likely remain less traumatic, less costly and more quickly finalised.
15. Is it likely that any increase in civil child sexual abuse cases would have a substantial impact on insurance premiums?	This seems doubtful, for the reasons discussed in the Discussion Paper (p 20-21).
16. If there were an impact on insurance premiums, is it likely that this would have any impact on the viability of any NGOs offering services to children, and how could this be managed?	I do not have sufficient information to be able to comment on this question.